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Supreme Court of the United States

No. 77-1327

LAKE COUNTY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT STATE OF NEVADA

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BRIEF FOR RESPONDENT STATE OF NEVADA

QUESTIONS PRESENTED

I. IS TRPA AN AGENCY OF CALIFORNIA AND NEVADA OR IS IT A POLITICAL SUBDIVSION OF BOTH STATES?

II. DID CALIFORNIA AND NEVADA WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY BY JOINING THE TAHOE REGIONAL PLANNING COMPACT?

STATEMENT OF THE CASE

Nevada adopts and incorporates the Statement of the Case set forth in Tahoe Regional Planning Agency's brief on the petition.

Nevada was named as a defendant in the Lake County Estates' complaint but was never served with process. Nevada was a defendant and served in the Jacobsen and Layton-Tahoe complaints, which were consolidated with Lake County and a fourth case (Jones) before the Court of Appeals. The consolidated opinion of the Court of Appeals (Petition, Appendix A) affirmed the District Judges' dismissals of Nevada from Jacobsen and Layton-Tahoe.

Neither Jacobsen or Layton-Tahoe petitioned this Court for review. Nonetheless, Nevada is vitally concerned with this Court's decision on the writ granted herein as to whether the TRPA is a political subdivision or an agency of the State of Nevada. Nevada does not agree with Petitioners' statement (fn. 3, page 4, Brief for Petitioner) that only TRPA and the individual

respondents are adverse to the petitioners. Nevada submits that she is adverse to the petitioners insofar as a waiver of her Eleventh Amendment immunity is drawn into question.[1]

ARGUMENT

I. The Tahoe Regional Planning Agency Is a Political Subdivision of the State and Is Not a Department or Agency of The Executive Branch of State Government.

The question of whether the Tahoe Regional Planning Agency (TRPA) had Eleventh Amendment immunity should be addressed first since if the Court should conclude that TRPA has none it will not be necessary to reach the question of waiver. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, at 280.

1/ Nevada did not file a brief in opposition to the Petition for Certiorari, as it did not seek review of the Court of Appeal's holding that an action for inverse condemnation would not lie against TRPA. Neither did Nevada view the petition as entirely without merit since Nevada is in agreement with Petitioners that the TRPA is not an agency of the State but a political subdivision. Consequently, Nevada did not file a statement with the Clerk waiving the right to oppose the petition.

Article III(a) of the Tahoe Regional Planning Compact, 83 Stat. 360, states that the Tahoe Regional Planning Agency is created as a "separate legal entity". The only meaning which can be ascribed to the words "separate legal entity" is that the Congress and the California and Nevada Legislatures intended that the TRPA be a legal entity apart and distinct from, and in no way connected with, the Federal government, either State government or county or local governments. Indeed, the only control which either State can exercise over the TRPA is to withdraw from the Compact (Art. VIII(c)) or through its amendment by the States and Congress.

The Eighth Circuit Court of Appeals held in Petty v. Tennessee-Missouri Bridge Comm., 254 F.2d 857, 859, reversed on other grounds, 359 U.S. 275 (1959), that the bistate bridge commission was not a "separate entity" apart from the two states, but instead held it was an agency of the two states in view of the nature and limited powers of the commission. The Court viewed as determinative of the question the fact that (1) the two governors made all appointments; (2) the governors could veto all actions taken by the commission; (3) the commission's bonds were exempted from both states' taxation statutes; and (4) title to the bridge facility would vest in the two states when the bonds were paid.

Significantly, the State of Nevada has no authority or control whatsoever over the TRPA, its policies, its deliberations, or its actions. Such lack of direction and control is in marked

contrast with departments, boards and commissions of the Executive Branch of State Government over which the Governor has the direction and control thereof and the State has the ultimate responsibility for their budgets, policies, programs and actions.

Although the Legislatures gave the TRPA the status of a "separate legal entity", they did not, except zoning, vest in TRPA any of the other powers generally characteristic of a political subdivision of a state such as the power to tax, to elect officials, or the power of eminent domain. Richmond County Hosp. Auth. v. McClain, 144 S.E.2d 565, 566. Since the TRPA was not given those powers normally attributable to political subdivisions, one might have urged with some justification that the TRPA was not a political subdivision after all, but merely an agency of the states. To remove any doubt of whether TRPA is an agency of the states, or to preclude any such construction by the Courts, the Legislatures specifically provided that for the purposes of suit, the TRPA would be deemed a political subdivision.

The zoning power traditionally has been delegated to and exercised by local government subdivisions as matters embracing local community concerns, Warth v. Seldin, 422 U.S. 490, 508, n.18. Since neither of the three Nevada counties could implement zoning controls outside the county, the TRPA was conceived to cut across the county lines and exercise zoning controls throughout the lake basin. Even then, each county is still permitted (Art. VI(a) to enact zoning ordinances which enforce equal or higher land use standards than those prescribed by TRPA ordinances.

Article VI(b) of the Compact does provide that for purposes of enforcing TRPA ordinances. "[T]he agency shall be deemed a political subdivision of both the State of California and the State of Nevada." (Emphasis added) It is also worthwhile to note that agency is not a political subdivision of each state but partakes of the sovereignty of "both" states. It is one separate political subdivision of both states.

The California Supreme Court, in People ex rel. Younger v. County of Eldorado, 96 Cal.Rptr. 553, 487 P.2d 1193 observed that the TRPA was on an equal legal footing with local political subdivisions such as general improvement districts.

The fact that the TRPA was conceived in part by an act of the Nevada Legislature does not make it any more an agency of the State than it is an agency of California or an agency of the United States because of the acts of the California Legislature and the Congress approving the Compact. The counties and incorporated cities within Nevada are not agencies of the state merely because they are created or receive their charters by acts of the Legislature, otherwise, no political subdivision could ever be created. As further evidence that the states and the Congress did not view the TRPA as a state agency is found in Article VII(f) of the Compact "that no obligation contracted by the agency shall bind either of the party states ..."

The petitioners have ably discussed (Pet. Brief pp. 15-18) the decisions of this Court and others which looked to the characteristics and powers of a governmental unit and how its functions related

to the State. Nothing will be gained here by further discussion. In addition, Nevada is in agreement with Petitioners' argument (Pet. Brief p. 18-22) that the TRPA is a political subdivision of both states and not an agency of either.

II. NEVADA HAS NOT WAIVED HER ELEVENTH AMENDMENT IMMUNITY BY JOINING THE TAHOE REGIONAL PLANNING COMPACT.

A. The Court of Appeals held It Was the State's Immunity Which Was Not Waived.

Assuming arguendo that TRPA is an agency within the executive branch, Nevada submits that the compact did not waive her Eleventh Amendment immunity.

Petitioners characterize the question of waiver (Question Presented III, and Arguments IA and IC) solely of the TRPA losing its Eleventh Amendment immunity. Petitioners' characterization of the waiver does not accord with the Court of Appeals holding. The Court of Appeals concluded (Pet. for Cert., App. A, p. 8):

> "*** [T]he TRPA is immune from suit under the Eleventh Amendment so long as the states have not waived their immunity as to suit against the entity which they created." (Emphasis added)

This is a clear holding that the immunity, if it is to be waived, is the immunity of the states and not the immunity of an agency of either state. Since a state can only act through officers and agents, an agency of the state and the state are indistinguishable. It follows

that it is the immunity of the State which attaches to her agencies and instrumentalities.

B. Waiver by a State Of Her Eleventh Amendment Protection Will Be Held Only In The Most Clear Circumstances.

The decisions of this Court are clear on this point - a waiver of a state's Eleventh Amendment protection will be found in only the most clear and explicit circumstances.

> "*** Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54." Edelman v. Jordan, 415 U.S. 651, at 673.

In Great Northern Ins. Co. v. Read, the Court said (322 U.S. at 54):

> "...when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

This Court has found a waiver of a state's Eleventh Amendment protection in two cases when a state had entered into an area or conducted activity which were subject to regulation by Congress.

In Petty v. Tennessee-Missouri Bridge Commission, supra, the two states built and maintained a bridge over and in navigable waters which were under the exclusive regulatory power of the Congress. Suit was brought under the Jones Act for a seaman's (ferryboat hand's) death. The interstate compact authorized the commission to "sue and be sued" and also expressly reserved undiminished the full right and power of the federal courts regarding navigable waters and rivers. Since the bridge commission had been held to be an instrumentality of both states the "sue and be sued" clause was actually consent by the states to a suit against them. This Court read the reservation of judicial power together with the sue and be sued clause as rendering the two states amenable to suit in Federal Court under Congress' plenary power to regulate commerce on navigable waters under the Jones Act.

The Tahoe Regional Planning Agency Compact does not contain a similar provision reserving jurisdiction of the federal courts. It is submitted that

such a provision was not necessary because nowhere does the United States Constitution vest in the Congress any power to regulate the use of land under zoning criteria. It is further submitted that the rights of plaintiffs alleged to be violated do not arise under any federal law implementing Congress' plenary power over commerce such as FELA or the Jones Act.

In Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964), the state owned and operated a railroad in interstate commerce. Alabama argued it was immune from suit under the Federal Employers' Liability Act by reason of the Eleventh Amendment. This Court disagreed, saying that the plenary power to regulate interstate commerce gave Congress power to subject the state, as a common carrier, to the federal act; and that when the state chose to operate a railroad in interstate commerce it necessarily consented to suit authorized by the FELA.

In the present case, the State of Nevada has not entered into any sphere of activity which the Constitution gives Congress exclusive regulatory power. On the contrary, the zoning of use of property is not ordinarily a matter for Congressional concern, but is of local concern, Warth v. Seldin, supra, p. 5. The power of zoning historically has been delegated to local government subdivisions by the states. Thus, Nevada and California have not left an area reserved to them by the Tenth Amendment, i.e., local zoning.

Petitioners place much reliance on Art. VI(b) (Pet. Brief, p. 24) by

reading into it far more than the provision literally provides.

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

What is the purpose of VI(b)? It places a duty upon the states, TRPA and local government to enforce the Agency's ordinances, and regulations, and vests state and federal courts with enforcement jurisdiction. It is civil and criminal actions brought by the states, TRPA or local governments to enforce agency ordinances to which VI(b) is directed - not actions by private citizens against the agency. Certainly Lake County's complaint in inverse condemnation is not an action to enforce the land use ordinance Nor can Lake County's complaint for

injunctive relief be viewed as an action to enforce the very land use ordinance which is attacked.

Furthermore, there is a heavy burden on the petitioners to show an "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) and Fay v. Noia, 372 U.S. 391 (1963). It is submitted that the petitioners have not met their heavy burden in this case.

CONCLUSION

For the reasons stated in Argument I, it is respectfully submitted that the holding of the Court below that the TRPA is an agency of the States of California and Nevada should be reversed and the case remanded for further proceedings. For reasons stated in Argument II, the holding of the Court below that the party states did not waive their immunity should be sustained.

Dated: September 20, 1978.

Respectfully submitted,

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